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In The
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. 524

ET&WNC TRANSPORTATION COMPANY,
a corporation,
Appellant
vs.
JAMES S. CURRIE, Commissioner of Revenue of
the State of North Carolina,
Respondent

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

Decided March 2, 1959
Opinion Per Curiam

KESTER WALTON
18 Church Street
Asheville, North Carolina,
JAMES H. EPES, JR.
Thad A. Cox Building
Johnson City, Tennessee
Of Counsel
HARRIS, VAN WINKLE, WALTON AND BUCK
18 Church Street
Asheville, North Carolina
COX, EPES, POWELL & WELLER
Thad A. Cox Building
Johnson City, Tennessee

INDEX

Page

Grounds for Re-hearing 2

The Effect of the Court's Decision 3

The Controlling Facts 5

Propositions of Law 6

Argument and Authorities Relied on 9

Conclusion 24

Certificate of Counsel 25

AUTHORITIES

Constitution of the United States, Article 1, Sec. 8, Cl. 3 2

Cases

Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 69 L. ed. 916, 45 S. Ct. 477, 44 A. L. R. 1219 16

Atlantic L. Co. v. Commissioner of Corp. and Taxn., 298 U. S. 553, 80 L. ed. 1328 14

Castle v. Hayes Freight Line, 348 U. S. 61, 99 L. ed. 68, 75 S. Ct. 191 4

Cheney Bros. Co. v. Mass., 246 U. S. 147, 62 L. Ed. 632, 38 S. Ct. 295 14

Cooney v. Mountain States Teleg. and Teleph. Co., 294 U. S. 384, 70 L. ed. 934 ..... 13, 15

Freeman v. Hewit, 329 U. S. 249 19

Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638 12

Page

Hattiesburg Grocery v. Robertson, 126 Miss. 34, 88 So. 4, 260 U. S. 710, 67 L. ed. 475, 25 A.L.R. 748 ... 11

Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662 ... 16

Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 ... 20

Lelqup v. Port of Mobile, 127 U. S. 640, 322 L. ed. 311 ... 14

Maxwell v. Mfg. Co., 204 N. C. 365, 168 S. E. 397, affirmed 291 U. S. 642, 78 L. ed. 1040 ... 10

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 ... 15

Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 92 L. ed. 1832 ... 13

Michigan-Wisconsin P. L. Co. v. Calvert, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396 ... 12, 21, 23

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 ... 20

McLeod v. J. E. Dilworth Co., 322 U. S. 327 ... 22

New York ex rel. Cohn v. Graves, 300 U. S. 308 ... 16

Nippert v. Richmond, 327 U. S. 423 ... 22

Northwestern States Portland Cement Co. v. Minn., No. 12, 27 L. W. 4141 ... 2

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 69 L. ed. 439, 45 S. Ct. 184 ... 14

Railway Express Agency, Inc. v. Virginia, 347 U. S. 359, 98 L. ed. 757, 74 S. Ct. 558 ... 10, 11

Shaffer v. Carter, 252 U. S. 37 ... 15

Spector Motor Service v. O'Connor, 340 U. S. 602 ... 16

Terminal Taxicab Co. v. Kutz, 241 U. S. 252 ... 18

Page

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 17

Williams, as State Revenue Commissioner v. Stockham Valves and Fittings, Inc., No. 33, 27 L. W. 4141 2

Wheeling Steel Corp. v. Fox, 298 U. S. 193 15

Wisconsin v. Minn. Min. & Mfg. Co., 311 U. S. 452 15

Statutes

49 U. S. C. A., Sec. 301 2

N. C. Revenue Act of 1929, Chapter 345, Sec. 311 (a) 10

N. C. G. S., Sec. 105-134 10

N. C. G. S., Sec. 105-161 3

N. C. G. S., Sec. 105-242 4

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PETITION FOR REHEARING

MAY IT PLEASE THE HONORABLE COURT:

Appellant, ET&WNC Transportation Company, respectfully and deferentially presents this its petition for a rehearing of the above entitled cause.

GROUNDS FOR REHEARING

Appellant is much aggrieved by the Opinion Per Curiam entered by this Honorable Court in the above entitled case on March 2, 1959, in which the judgment of the learned Supreme Court of the State of North Carolina was affirmed by this Court on the authority of *Northwestern States Portland Cement Co.* v. *Minnesota,* No. 12, October Term, 1958, decided February 24, 1959, and *Williams, as State Revenue Commissioner* v. *Stockham Valves and Fittings, Inc.,* No. 33, October Term, 1958, decided February 24, 1959.

Appellant craves the further indulgence of the Court in distinguishing its case from the *Northwestern* and *Stockham* cases because it does not believe that they are decisive or controlling of its case for the reason that the alleged taxpayers in those cases were not operating under a specific grant of authority from the Congress of the United States which authorized and permitted them to operate in said States irrespective of State law; whereas, all of Appellant's activities in North Carolina are authorized by and under the protection of the Federal Motor Carrier Act of Congress of 1935 as amended (49 U.S.C.A. 301 et seq.), which is authorized by and founded on the Commerce Clause of the Federal Constitution (U. S. Const. Art. 1, Sec. 8, Cl. 3).

Appellant does nothing in North Carolina which that State has the power to prohibit; whereas, even though *Northwestern* and *Stockham* did not in fact domesticate in their respective States, Minnesota and Georgia, it may be that under the laws of those States they should have domesticated and without domesticating the States might have prohibited their local activities, though the decisions in those cases do not rest on that basis.

THE EFFECT OF THE COURT'S DECISION

Appellant respectfully submits that the practical effect of the Honorable Court's decision in sustaining the tax in question is to permit North Carolina to add a condition to the Federal Motor Carrier Act of 1935 requiring it, as an exclusively interstate carrier in North Carolina, to pay said tax or cease its operations in that State as no carrier could continue to operate without paying the tax.

Section 105-161 of the General Statutes of North Carolina provides:

1. That a failure to file a return and pay the tax when due subjects the taxpayer to the payment of an additional amount equal to 5% thereof;

2. That a failure to file and pay within 60 days after due date subjects the taxpayer to an additional amount equal to 25% thereof and authorizes the issuance of a writ of mandamus; and,

3. That a willful failure to pay the tax as required shall, in addition to the other penalties, make the taxpayer guilty of a misdemeanor and, upon conviction thereof, subject to

a fine of not more than $500.00 or imprisonment not exceeding six months, or both fine and imprisonment at the discretion of the Court.

Section 105-242 of said North Carolina Statutes provides that if the tax is not paid within 30 days after due date the Commissioner of Revenue shall issue an order to the Sheriff of any County of the State, commanding him to levy upon and sell the property of the taxpayer for the payment of the tax with added penalties, additional taxes, interest and cost, etc.

So it is the practical effect of the North Carolina income tax law to require Appellant to pay the tax or stop hauling freight into and out of that State.

On the other hand, this Court held in *Castle* v. *Hayes Freight Line*, 348 U. S. 61, 99 L. ed. 68, 75 S. Ct. 191, that:

> "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by § 306 of 49 USC which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity."

THE CONTROLLING FACTS

All of the facts in this case are stipulated by the agreement of both Appellant and Respondent and there is a concurrent finding of both North Carolina Courts that such stipulated facts are the facts of this case.

Appellant believes that the controlling and decisive facts are:

(1) That it is a Delaware corporation engaged, exclusively in North Carolina, as a common carrier of freight for compensation by motor vehicle in interstate commerce under the Federal Motor Carrier Act of 1935 and the Interstate Commerce Clause of the Federal Constitution.

(2) It is not domesticated in North Carolina and has never been domesticated in that State.

(3) It has no intrastate business in North Carolina and has never had. It does nothing in North Carolina which is not necessary for its interstate business.

(4) It owns no property, real or personal, in North Carolina except such property as is necessary for its interstate business.

(5) The only freight handled in North Carolina is that which either originates outside of North Carolina or is destined to points outside of that State.

(6) It does an interstate transportation business only between the States of North Carolina, South Carolina, Virginia, Tennessee and Georgia.

(7) Its principal office is in Johnson City, Tennessee. It has no principal office in North Carolina. In fact, it has no offices of any kind in North Carolina except such as are incident to and necessary for its interstate operations in North Carolina.

(8) Notwithstanding its business in North Carolina is exclusively interstate, it paid $48,954.00 of taxes in that State for the fiscal year ending June 30, 1954.

(9) The alleged income taxes paid under protest and sued for in this case amount to $15,812.80, together with interest and costs.

(10) All procedural steps necessary for recovery of said taxes have been taken by Appellant.

(R. pp. 21-32)

PROPOSITIONS OF LAW

Appellant respectfully insists:

(1) That North Carolina cannot prohibit it doing an interstate business in that State.

(2) That an income tax is, to all practical purposes, an excise tax or a privilege tax.

That the income tax sought to be recovered by Appellant is a direct tax upon earnings derived exclusively from interstate commerce for the privilege of earning income in North Carolina and, in effect, said tax has been so designated by the Supreme Court of that State.

(3) That the designation of the tax, or a particular name given to it, cannot take away the Court's duty to consider its true nature and effect of the tax which would be the same under any other name, and the holding of the learned Supreme Court of North Carolina that there is a distinction to be made between the nature of that State's excise tax imposed for the privilege of transacting business within the State and the nature of the income tax involved here, "which is based on a past fact of earned net profits" is not well taken.

(4) That Appellant's earnings, as is its business, or as are its activities, in all of the States in which it operates, are inseparable and no part of its earnings, business or activities may be separated and allocated to any State in which it operates for the purpose of State taxation.

(5) That the income tax sought to be recovered is a direct burden on interstate commerce, and as such said tax is prohibited by the Interstate Commerce Clause of the Federal Constitution, irrespective of how said tax is apportioned.

(6) That the situation here is different from one where the alleged taxpayer is a resident, or has the privilege of residence, or has a domicile in the taxing State, or should have such.

(7) That the local business of a foreign corporation may support an excise tax measured in any reasonable way, if neither interstate commerce nor property beyond the taxing state is taxed.

The apportionment of net income sought to be taxed, or

apportioned and taxed, is immaterial if the tax is laid on interstate commerce or on account of interstate transactions.

(8) That there is no substantial difference in a State laying a tax on the privilege of engaging in interstate commerce and in laying the said tax on (the privilege of) earning an income from interstate transactions, and the Court has struck down State taxes laid on exclusively interstate business.

(9) That under the holding of the Honorable Court in the *Northwestern* and *Stockham* cases, interstate commerce may be subjected to the burden of multiple taxation, and the possibility of such taxation, in and of itself, is a burden on interstate commerce. So is the burden of showing multiple taxation. The expense and time involved are prohibitive.

(10) In taxing Appellant as in this case, and other undomesticated foreign corporations carrying on an exclusively interstate transportation business under said Motor Carrier Act of 1935, North Carolina has erected a wall around its borders preventing an entry of commerce from other States, or preventing the free flow of commerce from other States, unless such commerce pays said income tax, as it cannot be contended that Appellant can continue to haul freight into and out of North Carolina if it refuses to pay said tax.

It may be that the commerce resulting in the earnings taxed has ended so far as that tax is concerned, and certainly it has ended so far as all future commerce is concerned unless that tax is paid, as no carrier, interstate or

otherwise, can haul freight, from one State to another or otherwise, with distress warrants for delinquent taxes in the hands of the sheriff.

(11) It is impossible for Appellant to show that the burden of the taxes sought to be recovered is reasonably related to the powers of North Carolina and North Carolina has no power to nullify the Federal Motor Carrier Act and prevent Appellant from hauling freight into and out of that State.

But, assuming that the amount of the tax sought could be balanced as against the powers of the taxing State, who can say when a State has overstepped its bounds in laying a tax on net income from interstate commerce which may be taxed only to the extent that such income is fairly related to the corporate activities of the taxpayer within the taxing State. For that reason alone the constitutional infirmity in the tax in question is believed to exist no matter how the tax is apportioned, under both the Interstate Commerce Clause and also under the Due Process Clause.

(12) That Appellant does "pay its way".

ARGUMENT AND AUTHORITIES RELIED ON

Taking up the foregoing propositions in the order stated, Appellant respectfully submits:

(1) That it is a Delaware corporation, undomesticated in North Carolina and not subject to domestication in that State. That its principal office is in Johnson City, Tennessee from which its operations are directed; that it has no office or property in North Carolina except such as is

necessary in its interstate business, and that it does nothing in North Carolina except haul freight either in or out of that State, and such other acts as are necessary therefor. Its operations are entirely under said Federal Motor Carrier Act and the Commerce Clause of the Federal Constitution.

As said by this Court in *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, 98 L. ed. 757, 74 S. Ct. 558:

> "As a consequence of the State's own policy, this appellant does no business in Virginia which the State has power to prohibit but does only such as it can conduct under protection of the Commerce Clause of the Federal Constitution." (p. 361)

(2) The North Carolina income tax is, to all practical purposes, an excise tax and has been so designated indirectly by the North Carolina Supreme Court.

In *Maxwell* v. *Mfg. Co.*, 204 NC 365, decided in 1933, and affirmed by the Supreme Court of the United States in 78 L. ed. 1040, 291 US 642, this Court, construing Section 311(a), Chapter 345 of the Revenue Act of 1929, predecessor to Section 105-134, stated:

> "The tax imposed on income by the Revenue Acts of this state is not a tax on property within the meaning of the requirement of the Constitution, Article V, Section 3, that property shall be taxed according to its true value in money."

Among the many decisions cited as authority for this

statement was *Hattiesburg Grocery Co.* v. *Robertson*, 126 Miss. 34, 88 So. 4, 260 US 710, 67 L. ed. 475.

The Hattiesburg case is also reported in 25 ALR 748, and on p. 753 of that report, the Court says:

> "While a tax on income includes some of the elements both of a tax on property and a tax on persons, it cannot be classified as strictly a tax on either, for it is generically and necessarily an excise, and should be enforced as such unless and until so to do would accomplish the result, which Section 112 of the Constitution was adopted to prevent. . ."

(3) Even though the learned Supreme Court of North Carolina designates the tax as one which is laid "on a past fact of earned net profits" rather than on "the privilege of transacting business within the State", and specifically as Appellant insists, on the alleged privilege of earning an income or net income in North Carolina, (Jurisdictional Statement p. 39), this Court will consider the realistic or practical nature and effect of the tax.

As stated by the learned North Carolina Supreme Court, we must "come to grips with realities, not shadows." (Jur. St. p. 39)

As stated by this Court in *Railway Express Agency, Inc.* v. *Virginia*, supra:

> "While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value, including going-concern value, and prohibited taxa-

tion of gross receipts from interstate commerce, "neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect," *Galveston, H. & S. A. R. Co. v. Texas*, 210 US 217, 227, 52 L ed 1031, 1037, 28 S Ct 638, in which inquiry "we are concerned only with its practical operation." (p. 363)

(4) Practically speaking, and realistically, Appellant's earnings as its activities are inseparable and no part of either may be allocated to any State for the purpose of State taxation.

This Court said in the case of *Michigan-Wisconsin P. L. Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396 that:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

In *Railway Express Agency, Inc. v. Virginia, supra*, this Court said:

> "Here the State excises every receipt from movement of express in interstate commerce. It takes a portion of gross revenue from "all receipts earned in this State on business passing through, into or out of this State." It contends that this obvious burden on interstate commerce is validated by state protection of

a localized incident in the course of the business. The three incidents are originating the interstate movement, which required local pickup of the parcels; terminating the movement, which each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nation-wide business is vulnerable to a gross revenue tax in every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax."

In the case of *Cooney* v. *Mountain States Telea. and Teleph. Co.*, 294 U. S. (384-394) 70 L. ed. 934, 942, this Court said:

"In the instant case, the tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce. We do not pass upon the other questions presented."

In the case of *Memphis Natural Gas Company* v. *Stone*, 335 U. S. 80-105, 92 L. ed. 1832, 1840, this Court said:

"However, a state tax upon a corporation doing only an interstate business may be invalid under our decisions because levied (1) upon the privilege of doing interstate business within the state, or (2) upon

some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself."

(5) The income tax sought to be recovered in this case is a direct burden on interstate commerce.

In the case of *Atlantic L. Co.* v. *Com'r of Corp. and Taxn.*, 298 U. S. 553, 80 L. ed. 1328, this Court said:

> "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution. *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 69 L. ed. 916, 45 S. Ct. 477, 44 A. L. R. 1219; *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 153, 62 L. ed. 632, 636, 38 S. Ct. 295; *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 562 et seq., 69 L. ed. 439, 442, 45 S. Ct. 184."

In the case of *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648, 32 L. ed. 311, 314, this Court said:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to

Congress. This is the result of so many recent cases that citation is hardly necessary."

In the case of *Cooney* v. *Mountain States Teleph. & Teleg. Co.*, 294 U. S. 384-390 79 L. ed. 934, 942, this Court said:

"Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.*" (Emphasis Ours)

(6) The situation here is different from one where the alleged taxpayer is a resident or has a domicil in the taxing State or should be domesticated in that State.

In *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649-657, 85 L. ed. 1090, this Court said:

"In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there cf. *Wheeling Steel Corp.* v. *Fox*, 298 US 193, 80 L ed 1143, 56 S Ct. 773, supra, or upon net income derived from within the state, *Shaffer* v. *Carter*, 252, US 37, 57, 64 L ed 445, 458, 40 S Ct. 221; *Wisconsin* v. *Minnesota Min. & Mfg. Co.* 311 US 452, 85 L ed 274, 61 S Ct.

253; cf. *New York ex rel Cohn* v. *Graves*, 300 US 308, 81 L ed 666, 57 S Ct 466, 108 ALR 721, is not prohibited by the commerce clause on which alone taxpayer relies." (p. 656)

In the case of *Spector Motor Service* v. *O'Connor*, 340 U. S. 602-615, 95 L ed. 573, this Court said:

> "This Court heretofore has stuck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. *Alpha Portland Cement Co.* v. *Massachusetts*, 268 US 203, 69 L. ed. 916, 45 S Ct. 477, 44 ALR 1219 (measured by percentages of "corporate excess" and net income); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 69 L. ed. 439, 45 S. Ct. 184 (Measured by percentage of capital stock and surplus). See *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 669 et seq., 93 L. ed. 1613, 1621, 69 S. Ct. 1264 (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); *Joseph* v. *Carter & Weekes Stevedoring Co.* 330 US 422, 91 L ed 993, 67 S Ct. 815; *Freeman* v. *Hewit*, 329 US 249, 91 L ed 265, 67 S Ct. 274, supra." (p. 609)

(7) The local business of a foreign corporation may support a reasonable excise tax if neither interstate commerce nor property beyond the taxing State is taxed.

In the case of *Alpha Portland Cement Co.* v. *Massachu-*

setts, 268 U. S. 203-220, 69 L. ed. 916, this Court said:

> "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254, U. S. 113, 65 L. ed. 165, 41 Sup. Ct. Rep. 45, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state. Of course, the opinion does not support the suggestion that the present statute is free from the fatal objections to the former one because payment of the tax is no longer a condition precedent to carrying on any business." (p. 219)

(8) As said by the learned Supreme Court of North Carolina, "we must come to grips with realities and not shadows," (Jur. St. p. 39), and as said by this Court in *Spector Motor Service* v. *O'Connor*, supra:

> "It is not a matter of labels. The incidence of the tax provides the answer." (p. 608-9)

And Appellant insists that there is no substantial difference between a State laying a tax on a corporation engaging in interstate activities and the same corporation earning an income from the same activities. The income is but a continuation or end result of said activities which are in-

separable and all a part of interstate commerce. One cannot exist or survive without the other.

As said by this Court in the Spector Motor Carrier case, supra:

> "The incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate transportation. Its principal place of business is in Illinois. It is authorized by the Interstate Commerce Commission to do certain interstate trucking and by the Connecticut Public Utilities Commission to do part of such interstate trucking in Connecticut. Petitioner has filed with the Secretary of State of Connecticut a certificate of its incorporation in Missouri, has designated an agent in Connecticut for service of process and has paid the state fee required in that connection. It has not been authorized by the State of Connecticut to do intrastate trucking and does not engage in it. See *Terminal Taxicab Co.* v. *Kutz*, 241 US 252, 253, 254 60 L ed 984, 986, 36 S Ct 583, Ann Cass 1916D 765." (pp. 606-7)

Petitioner's business in North Carolina in much similar to that of Spector as last above described. (Jur. St., pp. 60-61)

As said by Mr. Justice Clark in the dissenting opinion of this Court in *Railway Express Agency, Inc.* v. *Virginia, supra*, concurred in by the Chief Justice, Mr. Justice Black and Mr. Justice Douglas:

> "The constitutionality of a State's tax laws should

not depend on the ability of State legislatures to foresee what tax language would most likely meet this Court's approval." (p. 372)

9. The possibility of multiple taxation is, in and of itself, a burden on interstate commerce.

As said by this Court in *Freeman* v. *Hewit*, 329 U. S. 249-286, 91 L. ed. 264, 274:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose on its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from inter-

state commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of goods, and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax."

This Court also said in the case of *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33-70, 84 L. ed. 565, 583:

"The taxation of the gross receipts in New York, on any appropriate view of what pertains to the interstate sales, would seem clearly to involve the *danger* of multiple taxation to which we have adverted in recent decisions." (Emphasis Ours)

In the case of *Joseph* v. *Carter & Weekes S. Co.*, 330 U. S. 422-445, 91 L. ed. 993, 1001:

"A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that com-

merce. This has been noted as ground for their invalidation . . . In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading . . ."

"We reaffirm the rule of Puget Sound Stevedoring Company. "What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." *Freeman* v. *Hewit, supra* (329 US 256, ante 274, 67 S Ct 274). Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences . . . The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

10. The North Carolina income tax law, as construed and applied in this case, erects a wall around the borders of that State which prevents the free flow of commerce from other States.

In the case of *Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U. S. 157, 98 L. ed. 538, 74 S. Ct. 396, this Court said:

"Such an aspect of interstate transportation cannot be "carve(d) out from what is an entire or integral

economic process," *Nippert* v. *Richmond*, *supra* (327 US at 423), by legislative whimsy and segregated as a basis for the tax. The separation must be realistic.

Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would "permit a multiple burden upon that commerce," *Joseph* v. *Carter & Weekes Stevedoring Co.*, *supra* (330 US at 429), for if Texas may impose this "first taking" tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or "unloading" from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. "The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." *McLeod* v. *J. E. Dilworth Co.*, 322 US 327, 330, 331, 88 L. ed. 1304, 1307, 64 S. Ct. 1023, 1030 (1944)"

11. It is an insurmountable obstacle for Appellant to show that the taxes sought to be recovered are reasonably related to the powers of the taxing State as there is no yardstick by which to measure either or to compare or balance one with the other.

In the case of *Michigan-Wisconsin P. L. Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583 74 S. Ct. 396, this Court said:

> "Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, and wait for Congress to adjust conflicts when and as it wished. But this view has not prevailed, and the Court has therefore been forced to decide in many varied factual situations whether the application of a given state tax to a given aspect of interstate activity violates the Commerce Clause." (p. 166)

12. The theory of the North Carolina income tax law being to require Appellant to "pay its own way," may it not be said that it does this in other taxes paid to North Carolina each year. During the fiscal year ending June 30, 1955 it paid $48,958.00 of taxes in North Carolina and during the fiscal year ending June 30, 1956 it paid like taxes of $47,412.00. (Jur. St. pp. 62, 63)

During the fiscal years ending from June 30, 1949 to June 30, 1959, both inclusive, the income taxes sued for in this case aggregated $15,812.80. (Jur. St. pp. 70-74)

CONCLUSION

In conclusion, Appellant respectfully insists that its case is not controlled or decided by the *Northwestern* and *Stockham* cases for the reasons hereinbefore set forth, and particularly that it is operated under a franchise or certificate of public convenience and necessity granted by the Congress of the United States, or rather by the Interstate Commerce Commission under the Federal Motor Carrier Act of the Congress of 1935 which authorizes and permits it to project its interstate truck lines into North Carolina regardless of the wishes or laws of that State, and any law of that State, including its income tax law involved here, which impedes or burdens its interstate operations, violates said Federal Motor Carrier Act, as well as the Commerce Clause of the Federal Constitution upon which it is founded.

Congress having assumed the all-embracing plan of control of interstate motor carriers, no power at all was left in the States to determine what carriers could or could not operate in interstate commerce, or to tax such carriers or their operations, regardless of any attempted allocation of income resulting exclusively from their interstate operations.

Appellant believes that there is a vast difference between a State tax laid against the income of a foreign, undomesticated common carrier corporation operating exclu-

sively in interstate commerce in North Carolina under a Federal franchise granted by the Interstate Commerce Commission under the Federal Motor Carrier Act of 1935 and in an income tax laid against the income of Northwestern and Stockham involved in the Minnesota and Georgia cases.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Supreme Court of the State of North Carolina be reversed.

KESTER WALTON

HARKINS, VAN WINKLE, WALTON AND BUCK
18 Church Street, P. O. Box 7376
Asheville, North Carolina

JAMES H. EPPS, JR.

COX, EPPS, POWELL & WELLER
Thad A. Cox Building
Johnson City, Tennessee

CERTIFICATE OF COUNSEL

We, Kester Walton and James H. Epps, Jr, counsel for the above named Appellant, do hereby certify that the

foregoing petition for rehearing is presented in good faith and not for delay.

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Counsel for Appellant